NOTES AND COMMENTS

BANKING

The Incident of Survivorship in Joint Bank Accounts

Deposits were made in a savings and loan company from the earnings of a husband and wife who had been married for over 50 years, the certificate of deposit being made out to John or Ida Fulk. On the death of the wife the husband was appointed administrator and filed an inventory of her estate, omitting therefrom the deposit certificates. Exceptions to the inventory were filed, exceptor contending that one-half of the account belonged to Ida Fulk's estate. The exceptions were sustained in the Probate and Common Pleas courts but overruled in the Court of Appeals, the latter awarding the entire account to John Fulk. On certification the Supreme Court affirmed the appellate decision, holding that the necessary survivorship clause was supplanted by parol evidence which was admissible to explain an incomplete contract of deposit as one for joint ownership with the right of survivorship.[1]

Where one deposits money in an account payable to himself or another, the legal effect thereof should be primarily dependent upon the intention of the depositor.[2] Analysis shows that such a deposit is usually interpreted in one of three ways. (1) The depositor has no intent to create any property interest in the non-contributing party, the power to withdraw being given merely for the former's own convenience.[3] (2) The depositor intends to pass neither a present property interest nor a right of withdrawal, but wishes the non-contributing party to receive the balance of the account when and if he should survive the depositor.[4] (3) The depositor wishes to create in the other party a present joint proprietary interest along with the right of survivorship.

[1] *In Re Estate of Fulk*, 136 Ohio St. 233, 24 N.E. (2d) 1020 (1940).

[2] 7 Am. Jur. Sec. 426, p. 301.

[3] *Bender* v. *Cleveland Trust Co.*, 123 Ohio St. 588, 176 N.E. 652 (1931); *Held* v. *Myers*, 48 Ohio App. 131, 192 N.E. 540 (1934). To the effect that the power to withdraw is revoked by the death of the depositor see *Smith* v. *Planters' Sav. Bank*, 124 S.C. 100, 117 S.E. 312 (1923).

[4] *Schmitt v. Schmitt*, 39 Ohio App. 219, 177 N.E. 418 (1928); *Jonte* v. *English*, 171 Okla. 291, 40 P. (2d) 646 (1935); *First Nat. Bank & T. Co.* v. *Huntley*, 25 Mich. 483, 232 N.W. 192 (1930). The prevailing view in these cases is that such a deposit is an ineffective attempt at a testamentary disposition. However, the survivor has been allowed to take in such a situation on the basis of contract, survival being a condition precedent. See Rowley, *Living Testamentary Dispositions*, 3 Cinc. L. Rev. 361, at 388 (1929), discussing *Dunn* v. *Houghton*, 51 Atl. 71 (N. J. Eq., 1902).

The present discussion will deal principally with the third interpretation, consideration being given to the various theories which have been advanced to effectuate such intention, along with an examination of Ohio cases in point.

Some courts have followed a trust theory to sustain the non-contributing survivor's claim, regarding the depository institution as trustee. This theory hase been severely criticized. A bank deposit in the general fund creates a debtor-creditor relationship; the bank cannot be trustee of its own obligation.[5] Furthermore it is difficult to find any intention to create a fiduciary relationship.[6]

Perhaps the most widely accepted theory is that title has vested in the non-contributing party by virtue of an *inter vivos* gift.[7] General rules of gift require intent to give plus delivery. The requirement of delivery, while not as rigorous as of old, still demands something more than the expression of a donative intent.[8] Retention of the passbook is not conclusive evidence against a gift,[9] although it is a circumstance to be considered.[10] Most cases hold that an intent to make a gift is not shown merely by a joint deposit, even if a survivorship clause is used.[11]

Recent case authority indicates a growing preference for the contract theory. Where all the funds deposited originally belonged to one party either a novation or a third party beneficiary contract is spelled out, based on the deposit itself.[12] Where the deposited funds are the contributions of both parties the contract is between them and is supported by mutual consideration.[13]

No Ohio cases purport to follow the trust theory; reference to it was made in *Cleveland Trust Co.* v. *Scobie*[14] but the decision was placed on other grounds. Joint tenancy and tenancy by the entireties are not recognized in Ohio;[15] therefore the decisions of this state are to

[5] Rowley, *Living Testamentary Dispositions*, 3 Cinc. L. Rev. 361, at 385-6 (1929).

[6] Note (1924) 38 Harv. L. Rev. 243.

[7] Deposit in Name of Depositor and Another, 48 A.L.R. 189, at 191, 66 A.L.R. 881, at 882, 103 A.L.R. 1123, at 1124.

[8] *Bradford* v. *Eastman*, 229 Mass. 499, 118 N.E. 879 (1918).

[9] *Vollmer* v. *Vollmer*, 47 Ohio App. 154, 190 N.E. 588 (1933); *Battles* v. *Millbury Savings Bank*, 250 Mass. 180, 145 N.E. 55 (1924).

[10] *Commercial Trust Co.* v. *White*, 99 N. J. Eq. 119, 132 Atl. 761 (1926).

[11] *Grady* v. *Sheehan*, 256 Pa. 377, 100 Atl. 950 (1917); *Rice* v. *Bennington County Sav. Bank*, 93 Vt. 493, 108 Atl. 708 (1920); *Rauhut* v. *Reinhart*, 180 Atl. 913 (Del. 1935); *Lay* v. *Proctor*, 147 Or. 545, 34 P. (2d) 331 (1934).

[12] *Chippendale* v. *North Adams Savings Bank*, 222 Mass. 499, 111 N.E. 317 (1916); *Deals, Admr.* v. *Merchants & Mechanics Savings Bank*, 120 Va. 297, 91 S.E. 135 (1917); *Christensen* v. *Ogden State Bank*, 75 Utah 478, 286 Pac. 638 (1930).

[13] In *Re Estate of Fulk*, 136 Ohio St. 233, 24 N.E. (2d) 1020 (1940); *Attorney General* v. *Clark*, 222 Mass. 291, 110 N.E. 299 (1915); In *Re Edwards Estate*, 140 Or. 431, 14 P. (2d) 274 (1932).

[14] 114 Ohio St. 241, at 253, 151 N.E. 373, at 376, 48 A.L.R. 182, at 188 (1926).

[15] Martin, *The Incident of Survivorship in Ohio*, 3 O.S.L.J. 48 (1937).

be explained either on a gift or contract basis. The effect of the Ohio courts' hostility toward the incident of survivorship[16] on the selection of a theory to support the surviving party's claim is not quite clear. *Cleveland Trust Co.* v. *Scobie* advanced no justification for its recognition of joint survivorship and hence did not prescribe any one method by which it can be obtained. But in the later case of *In Re Hutchison*[17] Chief Justice Marshall held that "While joint tenancy with the incidental right of survivorship does not exist in Ohio parties may nevertheless contract for a joint ownership with the right of survivorship and at the death of one of the joint owners the survivor succeeds to the title to the entire interest, not upon the principle of survivorship as an incident to the joint tenancy but by the operative provisions of the contract." The funds involved in this case were mutually owned before deposit; from this fact plus the language of the opinion it has been asserted that the court restricted recognition of the right of survivorship to instances where this right has been contracted for between co-owners, *i.e.*, owners of successive estates in the property.[18] The narrowing effect of this interpretation is apparent. But subsequent Ohio decisions have not so construed the case; it has been cited as requiring merely a contract between the parties (not necessarily co-owners) for the right of survivorship.[19]

In the *Scobie* case Judge Allen said that the depositor "has created in the second party by contract a joint interest in his right to the deposit equal to his own."[20] The supporting citation of several gift cases, as well as the demand that the intent to transfer a present interest be shown, casts some doubt upon the meaning of the court. Was the decision founded on principles of contract or did the court seize upon the contract as representing the completion of a valid *inter vivos* gift? In *Sage* v. *Flueck*,[21] a case determined after the *Hutchinson* limitation, there is language similar to that found in the *Scobie case*. However, the refusal to admit oral testimony to contradict the written expression of decedent's intention, as found in the deposit contract, points away from the gift analysis.

It is true that the pure contract approach is nearly identical with the gift theory which resorts to the contract for purposes of delivery. But at least one substantial difference does exist. Under the former analy-

[16] See Note 15, *supra*.
[17] 120 Ohio St. 542, 166 N.E. 687 (1929).
[18] Martin, *The Incident of Survivorship in Ohio*, 3 O.S.L.J. 48 (1937).
[19] *Sage* v. *Flueck*, 132 Ohio St. 377, 7 N.E. (2d) 802 (1937); *In Re Estate of Fulk*, 136 Ohio t. 233, 24 N.E. (2d) 1920 (1940).
[20] 114 Ohio St. 241, at 253, 151 N.E. 373, at 376, 48 A.L.R. 182, at 188 (1926).
[21] 132 Ohio St. 377, 7 N.E. (2d) 882 (1937).

sis, where the court considers the contract to be fully stated, the application of the parol evidence rule might contravene the intention of the parties.[22] This would not be possible under the gift theory; it is founded upon the intention of the depositor. The trend of the decisions in Massachusetts is significant in this respect. Language in *Chippendale* v. *North Adams Savings Bank*[23] negatives the necessity of gift or trust and upheld the survivor's claim via novation. But later Massachusetts cases[24] have construed joint deposits from the starting point of the donor's intention. The analysis is in terms of gift, delivery being rendered unnecessary by the contract of deposit.[25].

As for Ohio the *Fulk* case expresly rules out all question of gift and proceeds on principles of contract only. Since the funds deposited there were mutually owned the way is still open for future decisions, dealing with funds deposited by only one of the parties, to emphasize intent. The contract theory has been criticized for sometimes overemphasizing the form of deposit and underemphasizing intent.[26] In view of the fact that the parties are frequently closely related and consequently not always careful in the wording of the deposit this criticism would seem sound.

In many states joint deposits are now controlled by statute.[27] Ohio G.C. sec. 9648 was used as the basis for sustaining a survivor's claim in one Supreme Court case.[28] This section, as well as 720-120 authorizes a depository institution to pay funds to the survivor of joint depositors when the deposit provides for the right of survivorship. It would seem that these statutes were framed to protect the banks and not to control the rights of the depositors *inter sese*. It is significant that subsequent Ohio decisions have ignored the *Oleff* v. *Hodapp* rationale.

J. R. Y.

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[22] This would have been the result in *Held* v. *Myers*, 48 Ohio App. 131, 192 N.E. 540 (1934), had not the court construed the *Scobie* case as one of gift and therefore admitted evidence showing that the depositor did not intend to pass a property interest when he opened a "joint and survivorship account."

[23] 222 Mass. 499, 111 N.E. 317 (1916).

[24] *Bradford* v. *Eastman*, 229 Mass. 499, 118 N.E. 879 (1918); *Battles* v. *Millbury Savings Bank*, 250 Mass. 180, 145 N.E. 55 (1924); *Goldston* v. *Randolph*, 293 Mass. 253, 199 N.E. 896, 103 A.L.R. 1117 (1936); *Gibbons* v. *Gibbons*, 4 N.E. (2d) 1019 (Mass., 1936).

[25] Note (1937) 17 Boston U.L. Rev. 494.

[26] Note (1939) 27 Ill. B.J. 341.

[27] Deposit in Name of Depositor and Another, 103 A.L.R. 1123, 133-40.

[28] *Oleff* v. *Hodapp*, 129 Ohio St. 432, 195 N.E. 838 (1935).